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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 JENNIFER L. O'NEILL,

4 Plaintiff,

5 v.

11 Civ. 9128 PGG

6 TERRY RICHARDSON,

7 Movant,

8 v.

9 MERMAID TOURING, INC., et al.,

10 Defendants.

11 -----x

12 November 28, 2012  
13 5:00 p.m.

14 Before:

15 HON. PAUL G. GARDEPHE,

16 District Judge

17 APPEARANCES

18  
19 SNITOW KANFER HOLTZER & MILLUS LLP

Attorneys for plaintiff

20 BY: VIRGINIA KRISTINA TRUNKES, Esq.

21 Of counsel

22 PROSKAUER ROSE LLP (NY)

Attorneys for defendants

23 BY: STEVEN D. HURD, Esq.

RACHEL FISCHER, Esq.

24 Of counsel

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1 (Teleconference in chambers)

2 THE COURT: This is Judge Gardephe. Who do I have on  
3 the line?

4 (Case called)

5 THE COURT: As is probably obvious now, we have a  
6 court reporter here so I would ask both sides to identify  
7 themselves before they speak so we have an accurate record.

8 My notes indicate we have several items to discuss.  
9 This was originally on for the 20th, and we had to adjourn it  
10 for some reason I can no longer recall, but I know there is an  
11 issue about what the plaintiff claims is a non-production of  
12 certain e-mails by the defendants, and my sense from the  
13 correspondence is that the underlying issue about  
14 non-production has gone away, but that plaintiff is nonetheless  
15 seeking sanctions against the defendants for some aspect  
16 regarding the production of e-mails.

17 Ms. Trunkes, maybe you can enlighten me what it is  
18 you're still seeking in connection with the e-mails?

19 MS. TRUNKES: Sure, your Honor.

20 I guess you can say we gave up on trying to compel the  
21 production of Ms. O'Neill's House of Gaga e-mails because after  
22 what we described as being strung along for a while, and that  
23 is important, the defendants finally elaborated a bit and said  
24 look, because of the Google server, et cetera, this is all we  
25 have and Ms. O'Neill's personal House of Gaga account has been

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1 destroyed on this date certain, et cetera, we don't have any  
2 more.

3 At that point that's when we gave it a shot and tried  
4 to do our own forensic analysis based on an old laptop Ms.  
5 O'Neill had. Yes, we did do that later on in time, but that  
6 was only because we thought that these e-mails we were seeking  
7 were readily accessible, and we still believe that they were  
8 readily accessible, and that's really why we're seeking  
9 sanctions because from the few e-mails that we were able to  
10 recover from the forensic process, we found e-mails where, for  
11 instance, there would be a string of e-mails between different  
12 recipients and senders, and comparing that to what the  
13 defendants had produced, there were instances where the  
14 defendants produced, let's say, only the last item of the  
15 string, but not all the items that preceded that.

16 It seems like that made us realize that, you know,  
17 while these e-mails should have been readily accessible from  
18 the defendants, it does seem like only bits and pieces were  
19 given to us selectively, as what we did recover seemed far more  
20 illuminating about the underlying issues than what we did  
21 receive.

22 THE COURT: Basically the defendants have said the  
23 fact that you were able to forensically recover certain e-mails  
24 from your client's laptop does not mean that they have access  
25 to e-mails on their server.

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1           Their point is that the stuff was destroyed, and so I  
2           guess what I need to hear from you at this point is some  
3           evidence that although they say they don't have the e-mails any  
4           more, that that's false.

5           MS. TRUNKES: That is why I point to the example of a  
6           string of e-mails. So it is not explained how they would give  
7           us the last e-mail from a string of e-mails but that the  
8           beginning string of it would not be available.

9           I mean without having access exactly to what they  
10          possess, it is harder for us to prove beyond that, but that  
11          alone is an example of why wouldn't they have the earlier ones?  
12          It is the end e-mail of, let's say, seven corresponding e-mails  
13          back and forth.

14          THE COURT: All right. Mr. Hurd, do you have any  
15          light to shed on that question?

16          MR. HURD: I guess I have two points on that issue,  
17          your Honor: Number one, my only explanation for something that  
18          they have that we wouldn't have is that Ms. Germanotta deleted  
19          it and Ms. O'Neil did not. Therefore, it is on Ms. O'Neill's  
20          computer and not on Ms. Germanotta's computer.

21          From that standpoint, you know, we did produce  
22          everything we had. We didn't withhold something that was part  
23          of a string and just produce the last e-mail and not all the  
24          rest. If we had the rest, we would have produced them. Ginger  
25          has provided us with 13 of the e-mails that she claims she

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1 discovered on this forensic search. I don't know how many they  
2 actually discovered, but she did provide us with 13 of those  
3 e-mails. I invite the court to review those 13 e-mails  
4 because, quite frankly, none of them have anything to do with  
5 anything that is particularly relevant with this case and they  
6 certainly wouldn't be something that I would risk sanctions and  
7 my legal license not producing.

8 They're really a whole bunch of nothing. I don't  
9 understand why we would be in some sort of position where we  
10 would be trying to withhold these types of e-mails. They're  
11 really inconsequential e-mails. Those others that she found  
12 that are consequential, I am happy to review those, but there  
13 really isn't anything that is of any real relevance to this  
14 case. Again, if we had them, if they were in the possession of  
15 Ms. Germanotta, we produced them.

16 THE COURT: Is there anything else you want to say on  
17 the subject, Ms. Trunkes?

18 MS. TRUNKES: Yes, that they are relevant and I guess  
19 it is difficult to talk about this in the abstract. We are  
20 happy to supply what we found and explain its relevance and to  
21 elaborate on this further with any technical descriptions of  
22 how computers work, et cetera.

23 While I take Mr. Hurd's word for it that he produced  
24 what he had and, you know, is saying any other e-mails were  
25 deleted, in view of the technical analysis of this with a

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1 string of e-mails, for instance, that is very difficult to  
2 believe because how could the beginning parts of an e-mail be  
3 deleted when you still have the last one? That is just an  
4 example.

5 THE COURT: All right. Let me say, I do think it is  
6 very difficult to deal with the issue in the abstract. Right  
7 now there is a motion pending for default judgment and other  
8 sanctions. I am denying that at this point, but that is  
9 without prejudice to you, Ms. Trunkes, submitting a motion that  
10 is more detailed in the sense that it identifies specific  
11 documents that you believe the defendant only produced parts  
12 of; for example, your point about the e-mail chain, where they  
13 only produced the last e-mail and there is no explanation for  
14 why the e-mails earlier in the chain were not produced.

15 I am making the ruling without prejudice to you  
16 pursuing the matter, but it has got to be in a much more  
17 specific way, attaching documents that you believe demonstrate  
18 withholding of information and so forth. Then I'll ask Mr.  
19 Hurd to respond to it. Then we'll have a concrete dispute that  
20 I can actually deal with. At this point, it's just too  
21 amorphous.

22 MS. TRUNKES: Right.

23 THE COURT: What I would say to you, Ms. Trunkes, if  
24 you believe you have such concrete evidence, then you're  
25 welcome to make a motion seeking sanctions, and again just try

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1 to make it as concrete and as specific as you can. To the  
2 extent information about technical matters is necessary, put  
3 that in there, and then Mr. Hurd will have an opportunity to  
4 respond and address what you have raised and then I'll rule on  
5 it.

6 MS. TRUNKES: Okay. Thank you, your Honor.

7 THE COURT: The next issue I have before me relates to  
8 a deposition preparation binder that was apparently reviewed by  
9 Ms. Germanotta before her deposition. The plaintiff has sought  
10 production of the deposition binder, and the defendants have  
11 opposed that. Now, Mr. Hurd, I have a couple of questions for  
12 you at the outset on this issue. Does the binder contain  
13 privileged material?

14 MR. HURD: The actual documents themselves are not  
15 privileged and we have produced all of them.

16 THE COURT: Okay. So then I turn to you, Ms. Trunkes.  
17 I have a representation from Mr. Hurd that all the  
18 documents in the deposition binder have been produced in  
19 discovery. So the next and obvious question is, why are you  
20 entitled to know which documents Mr. Hurd decided it was  
21 important for Ms. Germanotta to look at before her deposition?

22 MS. TRUNKES: Because, your Honor, this is the very  
23 rare case where the deponent explicitly testified that she was  
24 fully prepared to give all her testimony after reviewing every  
25 single page of what was provided to her and that by doing so,

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1 that enables her to be able to give all this information  
2 accurately, et cetera, and it is exactly that type of situation  
3 which usually is more subtle, but it is exactly that situation  
4 which then gives the adversary the right to test the deponent's  
5 accuracy because then it becomes likely the information the  
6 deponent relied on had subjective effect on that person's  
7 testimony, and perhaps her testimony really wasn't credible or  
8 that she wasn't recalling correctly because she was recalling  
9 based on what she thought was important based on what was  
10 compiled for her, and these were selected materials.

11 While, yes, we may have all those materials, we have a  
12 whole lot of materials that were exchanged in discovery, but  
13 apparently it is those materials that were the basis, form the  
14 basis of her testimony, and this limited section of materials  
15 is that much more important to test her credibility.

16 The defendants don't truly argue that the binder and,  
17 as Mr. Hurd just said, the information was not privileged,  
18 there are no notes directly to the client, et cetera, and even  
19 if there was some work product, that alone is not dispositive  
20 given the balance of interests at stake. If ever there were a  
21 case where a deponent's testimony were now questionable, I  
22 think it would be this.

23 THE COURT: Mr. Hurd, do you want to respond?

24 MR. HURD: Well, at least in the letter to your Honor,  
25 the only testimony that plaintiff seeks that Ms. Germanotta



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1 said she read cover-to-cover is the deposition of Ms. O'Neill,  
2 which is understandable. She never testified that her  
3 testimony was based on any review of anything, and the quotes  
4 that plaintiff's counsel provides don't say that. That is not  
5 what she said.

6 Since all of the documents in the binder were  
7 produced, the only basis that plaintiff could possibly have for  
8 seeking the binder itself is to determine what documents we  
9 have. All the documents that were produced. We, as her  
10 counsel, we determined what was particularly important; and,  
11 therefore, those are privileged and we obviously provided the  
12 case law to that effect. There is no other reason for her to  
13 have that information because she already has the documents.  
14 So we would argue that it is privileged and would object to its  
15 production.

16 MS. TRUNKES: If I can just add that we didn't cite  
17 the different documents, but we cited the pages of the  
18 transcript which I understand, your Honor, you don't have. Ms.  
19 Germanotta identified several documents, not only Ms. O'Neill's  
20 deposition transcript. There were several different items, and  
21 obviously we would elaborate if there are more formal motion  
22 practice.

23 MR. HURD: If I can just respond.

24 We didn't object to the questions at the deposition,  
25 and Mr. Millus was free to explore that issue as far as he

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1 wanted to, but then to call for the production of the binder  
2 when it obviously is ordered and selected by counsel goes  
3 beyond what they're entitled to.

4 MS. TRUNKES: Except that the law does allow the  
5 adversary to inspect and review what the witness relied upon.

6 MR. HURD: Which they have.

7 THE COURT: I don't disagree with you, Ms. Trunkes,  
8 that the lawyer taking the deposition is entitled to have the  
9 documents that a witness reviewed, but Mr. Hurd has represented  
10 that all the documents were produced in discovery, so you have  
11 them or your colleague had him, whoever took the deposition.

12 Then what we're left with is are you entitled to know  
13 what Mr. Hurd thought was relevant because essentially that's  
14 what we're talking about here. Mr. Hurd put together, as I  
15 understand it, Mr. Hurd put together a binder of documents that  
16 he considered important for his client to review, and what I am  
17 struggling with here is it is hard for me to see how I can  
18 order the production of those documents without simultaneously  
19 causing Mr. Hurd, Mr. Hurd's evaluation of what is important in  
20 the case, for that not to be disclosed as well because that is  
21 essentially what we are talking about here.

22 MS. TRUNKES: Well, the cases that both of the parties  
23 rely upon discussed the order of the documents, and that would  
24 settle on an attorney's thinking. We are not asking them for  
25 any particular order. We are not looking to find out the

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1 attorney's thinking, but under the clear law when a witness's  
2 recollection of events is relevant, that's where we're asking  
3 to see well, then, what was the limited selection which  
4 suddenly gave a refreshment to Ms. Germanotta's memory she was  
5 so thoroughly prepared for her deposition.

6 MR. HURD: Your Honor, if I could respond to that.

7 There was no testimony from Ms. Germanotta that the  
8 binder in any way refreshed her recollection, and the quotes  
9 that plaintiff's counsel has provided in the joint letter  
10 doesn't say anything about Ms. Germanotta saying that the  
11 binder and the binder alone or the binder in combination with  
12 anything else refreshed her recollection about the facts in  
13 this case and what her testimony would be. She merely said she  
14 reviewed the binder, and we admit that she reviewed the binder  
15 as we do with anybody that we are preparing for testimony, and  
16 so that is not the issue.

17 With respect to not even the order, it is as you  
18 already said, the selection of the thousands of pages of  
19 documents that have already been produced by both sides, the  
20 selection by counsel of which documents we thought were  
21 relevant to the plaintiff in her review before her deposition.

22 THE COURT: Let me say, I've looked at Federal Rule of  
23 Evidence 612 (a), which is entitled, "Writing used to refresh a  
24 witness's memory," and (a) addresses scope, and the rule  
25 states:

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1 "This rule gives an adverse party certain options when  
2 a witness uses a writing to refresh memory: One, while  
3 testifying; or, two, before testifying, if the court decides  
4 that justice requires the party to have those options."

5 So I am confronted with a situation where counsel has  
6 represented that all of the documents contained in the  
7 deposition binder were produced in discovery so, therefore,  
8 they were available to plaintiff's counsel when the deposition  
9 was taken, and so what I am left with is that the primary  
10 purpose, I think, underlying this application is that  
11 plaintiff's counsel wants to learn what defense counsel thought  
12 were the most critical documents here.

13 I might say at the outset, a representation has been  
14 made that Ms. Germanotta did not say that her memory had been  
15 refreshed by the documents, but whether or not she said that,  
16 this isn't going to come up at trial, assuming there is a trial  
17 in this matter, I am not going to venture down the road of  
18 whether someone else's memory was good at the deposition or was  
19 not good at the deposition or was refreshed by documents  
20 particularly where apparently their memory was not refreshed in  
21 the way it ordinarily happens or someone says I have a failure  
22 of recollection, and then they're shown a document and their  
23 memory is thereby refreshed.

24 What I am left with is a concern that, as I've  
25 indicated, producing the binder would reveal defense counsel's

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1 evaluation of what the most significant documents are in the  
2 case, and on that point there is law that has been cited by  
3 defense counsel indicating that the selection of documents that  
4 a lawyer puts together can reveal work product information  
5 because it does tend to communicate what the lawyer believes  
6 are the most significant documents in the case.

7 For that proposition, I am relying on several of the  
8 cases cited by defense counsel in the October 12, 2012 letter,  
9 including Spork versus Pell, 759 F.2d 312, at 316 (3d Cir.  
10 1985), as well as the Second Circuit's decision in in re: Grand  
11 Jury Subpoenas, 959 F.2d 1158, at 1166. That is my ruling with  
12 respect to the deposition binder issue.

13 The next issue is defendant's request to maintain as  
14 confidential certain documents attached to defendant's motion  
15 to quash a non-party subpoena directed against a man named, I  
16 take it a man, Terry Richardson.

17 MS. TRUNKES: Yes.

18 MR. HURD: Yes.

19 THE COURT: Mr. Richardson, as I understand it, is a  
20 photographer. He was hired by one of the defendants to take  
21 photographs while that defendant was on tour. There is a  
22 dispute ongoing between the parties in this action about  
23 whether plaintiff is entitled to those photographs.

24 This is a case about compensation that the plaintiff  
25 argues she is entitled to, and I gather from prior conferences

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1 with the parties that the argument is that there may be  
2 photographs that show the plaintiff with the defendant; and,  
3 therefore, it tends to support her arguments about her hours  
4 and employment responsibilities with the defendant. So that's  
5 the backdrop.

6 There is a request now to maintain as confidential  
7 certain documents. The parties have, I guess, designated them  
8 as confidential pursuant to the protective order, so does that  
9 lay the groundwork, Mr. Hurd, adequately?

10 MR. HURD: Yes, your Honor, it does.

11 THE COURT: All right. So you want to lay out for me  
12 just briefly what the basis is for the application to maintain  
13 these documents? I gather you want them -- do you want them  
14 maintained under seal? Is that your application?

15 MR. HURD: Yes, your Honor, these are documents that  
16 were attached either to our motion to quash or plaintiff's  
17 counsel's opposition to our motion to quash the subpoena  
18 related to Mr. Richardson's photographs, and they fall into  
19 four categories:

20 One is testimony, deposition testimony from Ms.  
21 Germanotta;

22 One is deposition testimony from a Wendy Morris, who  
23 is a third-party witness;

24 One is e-mails between Ms. Germanotta and Ms. O'Neill,  
25 or other e-mails regarding Ms. Germanotta's business; and

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1           The fourth is the responses that we provided to  
2 plaintiff's request to admit during the discovery period.

3           With respect to Ms. Gaga's testimony, it was all  
4 designated as confidential pursuant to the court reporter who  
5 was selected by plaintiff's counsel, and then we informed  
6 plaintiff's counsel under the stipulation and order of  
7 confidentiality that we considered the pages that they have  
8 cited to be confidential, and I would note that Mr. Millus  
9 promised to Ms. Germanotta on the record that the testimony  
10 that she was giving was going to be considered confidential,  
11 and for some reason now they want that testimony to be  
12 disclosed, and it is our position that it should be  
13 confidential. It deals with Ms. Germanotta's business, and  
14 obviously she is a high-profile individual.

15           With respect to Ms. Morris' testimony, she is a third  
16 party that has nothing to do with this but has information  
17 related to it. We have designated this as confidential. It  
18 deals with Ms. Germanotta's business and her tours and things  
19 like that.

20           With respect to the e-mails, again they relate to Ms.  
21 Germanotta's business, and also to reveal them would also  
22 breach a separate confidentiality agreement that Ms. O'Neil  
23 signed when she started working for Ms. Germanotta back in  
24 2010.

25           Finally, with respect to our answers to requests to

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1 admit, those are are pleadings between the parties that have no  
2 reason to be disclosed at all, and most importantly certainly  
3 none of the requests to be made other than the one that  
4 plaintiff has identified as relevant to this case should have  
5 to be revealed. There is no reason for all of those responses  
6 for requests to admit be revealed.

7           Given the history of the case and the court's order  
8 the case not be tried in the press, we see no reason why these  
9 should not be filed under seal especially given the high  
10 profile of the individual we are dealing with. I can think of  
11 no reason why plaintiff would object to that other than they  
12 want to try this case in the press. That is our position on  
13 that with respect to those documents.

14           THE COURT: All right. Just I want to identify  
15 specifically what the documents are that are in dispute. As I  
16 understand it, they are Exhibits A through H that are attached  
17 to plaintiff's declaration in opposition to the motion to  
18 quash. Are those the exhibits that are in dispute?

19           MR. HURD: Yes, your Honor, with the exception of  
20 Exhibit F, which is simply your order of confidentiality. I  
21 don't think there is any reason to keep that confidential.

22           THE COURT: Okay. Now, I will examine all of these  
23 exhibits and make a determination. I will tell you, Mr. Hurd,  
24 that in doing so, I am going to be guided by the Second  
25 Circuit's decision in Lugash versus Pyramid Company of



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1 Onondaga, 435 F.3d 110 (2d Cir. 2006), and as I am sure you  
2 know, that sets a high standard for sealing. It requires me to  
3 make specific on-the-record findings that sealing is essential  
4 to preserve higher values and is narrowly tailored to serve  
5 that interest.

6 I suspect, based on what you've told me, that you're  
7 relying on the notion that private information or business  
8 information that could be harmful if disclosed, that's in  
9 general the basis for your application. Am I right?

10 MR. HURD: Well, I would add to that at least with  
11 respect to Ms. Germanotta's testimony and our responses to the  
12 request to admit, number one, an assurance from plaintiff's  
13 counsel during the deposition to my client he would not  
14 disclose the information she was testifying to, it would be  
15 kept confidential, I think that is relevant in your evaluation.

16 With respect to the requests to admit, I argue  
17 relevance. I truly believe plaintiff's counsel is providing  
18 attaching documents not relevant to the particular issue at  
19 hand simply to get them out there and get them ECF filed. The  
20 entire responses to 11 or 12 requests to admit, with only one  
21 request to admit is relevant to this motion, the motion to  
22 quash, seems to be completely inappropriate, and so I would  
23 also argue relevance.

24 I know that is not a term under the case you cite, but  
25 it is a term with respect to any motion that parties make, that

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1 they should only be including relevant information.

2 THE COURT: All right. Ms. Trunkes, is there anything  
3 you want to say on this subject before I move on?

4 I am not going to decide the issue on today's call. I  
5 need to rereview the documents individually. As I said, I'll  
6 determine how the Lugash case applies. Anything you want to  
7 say before we move on?

8 MS. TRUNKES: Yes, your Honor. Thank you. I have a  
9 couple of comments.

10 With respect to the responses to plaintiff's request  
11 to admit, it never occurred to us to limit just to one page  
12 that exhibit. Usually it is my practice to attach the entire  
13 document response and deposition testimony usually unless it is  
14 very large in this case. With respect to the deposition  
15 exhibits, we attached a total of four pages or so, a handful of  
16 pages, and they were all very relevant for exactly the points  
17 we were making.

18 I wouldn't characterize Mr. Millus' statement as a  
19 promise or assurance with respect to the entire testimony.  
20 That was at a particular point, the deponent Ms. Germanotta  
21 expressed tentativeness about saying something she wanted to  
22 say. He encouraged her to say it. If there was something  
23 confidential, or what your order says, personal information, we  
24 would certainly agree that should remain under seal. We are  
25 not trying to embarrass anybody.

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1           Finally, of course, we disagree with the proposition  
2           that just because we oppose sealing everything the defendant  
3           says, we must want to have this information in the press. That  
4           is not the equivalent. That is not our reason. It is  
5           following the same standard which your Honor pointed out which  
6           is in the confidentiality order the Lugash case.

7           THE COURT: Just so I know, what is the relevant  
8           admission or response to request to admit, because it sounds  
9           like there are a number of requests that were made but not all  
10          of them are relevant. What should I be focused on?

11          MR. HURD: Request No. 11, Request to Admit No. 11 is  
12          the one that plaintiff's counsel -- and, Ginger, correct me if  
13          I am wrong -- is relying on, and there are I think 12 requests  
14          to admit in the entire document.

15          THE COURT: All right. As I said, I will deal with  
16          this separately after I've had an opportunity to review each  
17          document.

18          Then we have defendant's motion to quash the non-party  
19          subpoena to Mr. Richardson that I mentioned a moment ago, and  
20          the defendants have offered essentially three arguments why the  
21          subpoena should be quashed, and just for the record again, the  
22          issue is certain photographs that Mr. Richardson took while on  
23          tour. The defendants argue that the subpoena is overbroad,  
24          that it seeks documents that are relevant to the litigation and  
25          that the subpoena is harassment under the circumstances.

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1           So let me start with the over-breadth point, and I  
2 think the issue is that the request seeks all images that were  
3 captured by Mr. Richardson during the tour, which I gather took  
4 place over a 13-month period. I think we've sort of been down  
5 this road before because I remember someone saying that it was  
6 impossible to isolate images of Ms. Germanotta and plaintiff  
7 from other photographs that Mr. Richardson may have taken on  
8 the tour. So if I am right about that, how can I find that the  
9 subpoena is overbroad?

10           The alternative, Mr. Hurd, is that Mr. Richardson be  
11 forced to go through all the images, and I understand there are  
12 a lot of them, and spend his time bulk-plucking out the ones  
13 that show Ms. Germanotta with the plaintiff. So that's the  
14 state of play.

15           I think the representation was made Mr. Richardson  
16 didn't want to take his time to go through through all the  
17 images and pluck out the ones that showed Ms. Germanotta with  
18 the plaintiff. So that being the case, what's the alternative  
19 to the production of the entire take?

20           MR. HURD: Well, your Honor, the other argument that  
21 we have presented is that regardless of whether Mr. Richardson  
22 does it or we produce the whole thing and Ms. O'Neill's counsel  
23 does it, it is not going to prove anything. So it is going to  
24 be an exercise in futility because the fact that Ms. O'Neil  
25 happened to be somewhere at a certain time when a picture was

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1 taken does not demonstrate what she was doing before that  
2 picture immediately, or immediately after that picture was  
3 taken and certainly doesn't demonstrate she worked a certain  
4 number of hours in a particular day or anything that would be  
5 relevant to this case.

6 There is no dispute Ms. O'Neil was with Ms. Germanotta  
7 on those tour dates, and so if that is what it proves, it  
8 certainly doesn't have any relevance to this case. A snapshot  
9 in time where she happened to be somewhere does not establish  
10 anything relevant to this case, and so essentially what their  
11 subpoena is requesting is that Mr. Richardson either produce a  
12 whole host of photographs that are his proprietary information  
13 in order for plaintiff to review all of those pictures, most of  
14 which are going to have nothing to do with this case and  
15 nothing to do with Ms. O'Neil.

16 Even those that do picture Ms. O'Neil are not going to  
17 have anything to do with establishing what her relations are in  
18 this case. Therefore, our position is that whether  
19 Mr. Richardson is forced to do it and go through and find all  
20 the pictures with Ms. O'Neil, or plaintiff's counsel does, it  
21 doesn't advance anything. It is not going to be something that  
22 is relevant discovery that will advance her case in any way.

23 There is not a dispute in this case, by the way, of  
24 any particular day or particular concert or particular  
25 situation that Ms. O'Neil didn't attend other than whether or

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1 not she was at behind the scenes, off stage directing Ms.  
2 Germanotta during the concerts, and a picture demonstrating  
3 that in one or two instances is certainly not going to  
4 establish she was there on a regular basis that would establish  
5 their claim.

6 All of these photographs really aren't going to  
7 provide anything, and we are talking about a third-party  
8 individual who has nothing to do with this case who would have  
9 either engaged in hours and hours and weeks and weeks of work  
10 in order to review them or turn over proprietary information  
11 for something that is really not going to advance this case in  
12 any way.

13 THE COURT: So how are the photographs relevant, Ms.  
14 Trunkes?

15 MS. TRUNKES: Your Honor, the photographs are entirely  
16 relevant. What Mr. Hurd described, it goes to the weight and  
17 not to the relevance of the photographs. First of all, the  
18 defendants don't even account for what if there are some  
19 pictures that --

20 THE COURT: Let me repeat the question. I had a very  
21 specific question. Tell me the relevance of photographs  
22 showing Ms. Germanotta with your client, tell me what the  
23 relevance of those photographs are to your case. That is my  
24 question.

25 MS. TRUNKES: To show her working or what hours of the

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1 day she was working or on call or nearby. Some of the photos  
2 of her may not assist Ms. Germanotta, even if not likely, but  
3 they will show her there and some may show her in the  
4 quick-change, which is the behind scenes change. Some show her  
5 physically assisting her with that. That is not something she  
6 would be standing around as a friend versus working. If she is  
7 standing around holding coffee and water next to Ms.  
8 Germanotta, she is likely working.

9 If she is sitting and talking with Ms. Germanotta  
10 somewhere, it is up to the parties and their credibility and  
11 for the fact-finder to determine whether she was working or  
12 whether they were just sitting there as friends. There is  
13 going to be a large dispute about that throughout this case,  
14 but the e-mails do not tell the entire story.

15 The photos are relevant because the photos will fill  
16 in the gaps of time when there aren't e-mails because if the  
17 parties were right next to each other, they would not be  
18 e-mailing to each other. Therefore, they're relevant.  
19 Photographs are highly detailed, objective evidence and it  
20 shows something that is missing here.

21 More importantly, the defendants have not sustained  
22 their burden. It is their burden to show undue hardship  
23 because Mr. Richardson does not address how the photos are  
24 stored. He doesn't address what efforts would have to be  
25 undertaken in order to just produce those photos, just copy

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1       them onto a flash-drive and give them to us if he doesn't want  
2       to use the iPhone technology to narrow them down.

3               This is a burden placed on the defendants, and they're  
4       not meeting it and it is fully objective evidence that the  
5       parties and the fact-finder should have to determine the facts  
6       in this case about to what extent Ms. O'Neil worked and was  
7       entitled to overtime.

8               THE COURT: Let me ask you this, Mr. Hurd: Are the  
9       photographs captioned?

10              Does Mr. Richardson have records indicating when each  
11      photograph was taken and where?

12              MR. HURD: Well, "where" I think he could probably  
13      determine from looking at them. When and in particular the  
14      time of day, they are not.

15              THE COURT: But there is information that would  
16      indicate the date a particular photograph was taken?

17              MR. HURD: I don't know if Mr. Richardson could do  
18      that by looking at them, just by his recollection, but there is  
19      nothing on the photographs, either behind the photograph or on  
20      the photograph itself, that has a date and time stamp.

21              MS. TRUNKES: Digital photos have that inherent with  
22      them. If you click on it in digital fashion, you will find the  
23      date.

24              MR. HURD: Mr. Richardson is a professional  
25      photographer, and the pictures are not necessarily -- I don't



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1 want to say none of them are, but they're not necessarily  
2 digital photographs.

3 THE COURT: I am ready to rule on the issue.

4 At this point it does seem to me, given the broad test  
5 that applies to pretrial discovery, that photographs showing  
6 the plaintiff with Ms. Germanotta on tour and perhaps  
7 performing work tasks could be relevant to plaintiff's claims.  
8 I certainly can't make a finding at this point that they are  
9 not. I do accept the proposition that a photograph can often  
10 be much more compelling evidence than, say, an e-mail that  
11 describes in black and white an event. So that is just a fact.

12 Sometimes a photograph, a visual presentation of an  
13 event is much more powerful than either the testimony about the  
14 matter from the witness or even documentary evidence. So in  
15 deciding how to rule on that, I have to be aware of that.

16 Now, with respect to the burden issue, I find that  
17 Mr. Richardson just hasn't demonstrated to me that there is any  
18 significant burden in producing the photographs. They will be  
19 produced in electronic form. The only argument that has been  
20 made is that it would be very burdensome for him to have to go  
21 through these photographs and select out the ones that depict  
22 the plaintiff and Ms. Germanotta, and I accept that, given the  
23 number of photographs, that would be a burden.

24 It seems to me the choice is for him to make, whether  
25 he wants to to take the time to go through the photographs

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1 themselves and produce only those that show the plaintiff and  
2 Ms. Germanotta, he's free to do that. If he doesn't want to  
3 take up his time doing that search, then he will produce all  
4 the photographs. They will be subject to the protective order  
5 in the case, so there won't be any disclosure of the  
6 photographs outside of the purposes of this case. Presumably  
7 they'll be returned to Mr. Richardson upon the close of the  
8 litigation, so I don't see any harm to him in terms of  
9 commercial exploitation of the photographs.

10 I leave up to him whether he wants to take the time to  
11 produce only the documents or only the photographs that depict  
12 the plaintiff and Ms. Germanotta to you or whether he would  
13 rather not go through that exercise and instead turn over a  
14 disc that contains all the photographs; and, therefore, require  
15 plaintiff's counsel to spend their time going through the take  
16 to figure out where the photographs are that show the plaintiff  
17 with Ms. Germanotta. So that is my ruling on the motion to  
18 quash.

19 MR. HURD: Your Honor, could I get some clarification  
20 on that?

21 THE COURT: Sure.

22 MR. HURD: I guess two issues: One, if we were to  
23 choose to have Mr. Richardson review the photographs himself,  
24 what would be the timing as far as producing those photographs?

25 THE COURT: Well, I don't at this point have a great

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1 handle on how burdensome that would be. The representation has  
2 been made there are thousands of photographs at issue taken  
3 over a 13-month period, and so my sense at this point is that  
4 it would be burdensome to go through all of the photographs and  
5 pluck out the ones that show the plaintiff with Ms. Germanotta,  
6 and I assume that that would take some time.

7 I am not really in a position at this point to make a  
8 determination of how long it should take. You'd probably be in  
9 a better position than me at this point to know how long would  
10 be a reasonable time to perform that exercise if that's the way  
11 Mr. Richardson prefers to proceed.

12 MR. HURD: Thank you.

13 MS. TRUNKES: May I make a suggestion? Is it --

14 THE COURT: Sure.

15 MS. TRUNKES: -- is it possible to consider the  
16 parties finding an independent forensic photography person to  
17 do that on his or her own so that we'll get a better concrete  
18 time, more of a motivation incentive to do it within a  
19 reasonable period of time and also a greater assurance of the  
20 integrity of the process which, unfortunately, will be a  
21 concern for plaintiff?

22 MR. HURD: Your Honor, first of all, that obviously  
23 raises the same proprietary information issues that we have  
24 with our motion to quash, which is that Mr. Richardson does not  
25 want his proprietary photographs being disclosed to others.

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1 In addition, there has been no argument that Mr. Richardson  
2 doesn't know what Ms. O'Neil looks like. I don't know that  
3 anybody else would be in a better position in determining  
4 whether Mr. O'Neill is or is not --

5 THE COURT: I am not going to hire Mr. Richardson or a  
6 third party to go through the photographs, the take to make  
7 sure he is producing what he has been ordered to produce. That  
8 is just not the way our system works. The courts issue orders  
9 that certain materials are to be produced, and the parties have  
10 that obligation. We don't hire third parties to make sure that  
11 they're actually going to do what a court has ordered them to  
12 do. If they don't do what they're told to do, there are  
13 obviously sanctions, including contempt sanctions that can be  
14 imposed where there was an intentional decision made to disobey  
15 a court order. I am not going to require the defendants or  
16 Mr. Richardson to pay for a third party to do this, to do this  
17 search and selection.

18 Now, as to time period, Mr. Hurd, do you have a sense  
19 of how long it would take to do this?

20 I am not going to give you a long time, so why don't  
21 we start with that. I want this matter resolved quickly.  
22 We're at the end. We are past the discovery deadline at this  
23 point, so I don't want this to delay the case.

24 MR. HURD: I appreciate that, your Honor, and that was  
25 why I asked the question because I don't know what

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1 Mr. Richardson's schedule is. He has represented it would take  
2 him a couple of weeks straight time in order to review them  
3 all, and I don't know what his schedule is particularly given  
4 the fact the holidays are coming up.

5 I would request at least a month for him to do so,  
6 which actually leads me to my other question on your order,  
7 which is if we were to elect -- if it is too burdensome for him  
8 to do the whole thing -- elect to provide plaintiff's counsel  
9 with all of the photographs, and again we haven't made a  
10 decision on that, having just gotten your order, but if we to  
11 do that, I appreciate your Honor said they would have to return  
12 the photographs that don't depict Ms. O'Neil after the case,  
13 but my question is whether any photographs other than those  
14 that depict Ms. O'Neil would be fair game for them to be used  
15 in this case?

16 THE COURT: Well, I think -- and you correct me if I  
17 am wrong, counsel -- that the request was made going back, as I  
18 understand it, for photographs that showed Ms. Germanotta with  
19 the plaintiff during the period of this 13-month tour. Was  
20 your request broader than that, Ms. Trunkes?

21 MS. TRUNKES: Yes, it was broader than that, although  
22 it wasn't as broad as to include other people not connected  
23 with Ms. Germanotta and her tour. We didn't want to  
24 unnecessarily narrow it to just pictures of Ms. O'Neil if  
25 perhaps there were some relevant photos that did not contain

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1 Ms. O'Neil. It is difficult for me to articulate why they  
2 might be relevant without having them and seeing them, and I  
3 wasn't on the tour so I wouldn't know, but it is true that our  
4 request was broader than just asking for Ms. O'Neill's  
5 pictures.

6 THE COURT: My ruling, just to be clear, it is limited  
7 to photographs that show the plaintiff with Ms. Germanotta. It  
8 doesn't extend to other staff working for Ms. Germanotta. It  
9 doesn't extend to pictures of Ms. Germanotta alone. The only  
10 relevance that's been explained to me of the photographs is  
11 photographs that might shed light on the plaintiff's work  
12 responsibilities for Ms. Germanotta. So I don't see how photos  
13 of others or photographs of Ms. Germanotta alone would be  
14 pertinent.

15 So if, Mr. Hurd, Mr. Richardson decides to go down the  
16 road of plucking out the photographs as opposed to producing  
17 his entire take, you should understand that the ruling that I  
18 have made is that photographs that show Ms. Germanotta and the  
19 plaintiff together, those are the photographs that he's  
20 required to produce.

21 MR. HURD: And if we produce all of the photographs  
22 just to save time, the only ones that plaintiff can use in this  
23 case would be those pictures involving Ms. O'Neill and Ms.  
24 Germanotta?

25 THE COURT: Is there anything you want to say before I

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1 rule on that subject, Ms. Trunkes?

2 MS. TRUNKES: I think consistent with your ruling,  
3 that's fine. I do wonder if there is any pictures of just Ms.  
4 O'Neill. I am sure there isn't, but if we can include that as  
5 a possibility?

6 THE COURT: I am not going to allow this to turn into  
7 a fishing expedition. There has been a certain basis, certain  
8 argument that has been made how these photographs are relevant.  
9 I have accepted the argument, but I am not going to allow that  
10 to be used as a wedge to get, to conduct a fishing expedition  
11 more broadly into all the photographs.

12 So the ruling is limited to photographs that show Ms.  
13 Germanotta and the plaintiff. It will not expand beyond that.  
14 So to answer your question, Mr. Hurd, if the decision is made  
15 to produce all the photographs, plaintiff's use of those  
16 photographs will be limited to photographs that show Ms.  
17 Germanotta and the plaintiff.

18 Now what I am going to require you to do, Mr. Hurd, I  
19 am going to give you a date certain by which time you're going  
20 to make the decision about how you're going to proceed because  
21 if the decision is made to turn over the entire take, there is  
22 no reason why that shouldn't happen right away.

23 MR. HURD: I don't disagree with that.

24 THE COURT: How about by Monday you'll notify myself  
25 and counsel, plaintiff's counsel, how you're going to proceed?

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1 MR. HURD: Your Honor, I am going to be going on  
2 vacation tomorrow, and I don't know if I will be able to speak  
3 with my client before then. I ask if I can have until  
4 Wednesday?

5 THE COURT: Okay. That is a week from today?

6 MR. HURD: Right.

7 THE COURT: You will tell us a week from today how  
8 you're going to proceed. If the decision is made you will just  
9 turn over the entire take, you will do that very promptly after  
10 a week from Wednesday, i.e., within a day or two.

11 If your decision is that Mr. Richardson is going to go  
12 through these photographs and pluck out the ones that show the  
13 plaintiff with Ms. Germanotta, what you've asked for is a month  
14 to allow him to do that. Ms. Trunkes, do you object to that?

15 MS. TRUNKES: No. A month is reasonable.

16 THE COURT: If that's the course that is decided upon,  
17 Mr. Richardson will have a month from that point. Why don't  
18 we, for ease of reference, just have it run a week from today?  
19 I don't have a calendar in front of me. The 30 days will run a  
20 week from today if that is the course that is decided on.

21 Now, are there any other issues that we should talk  
22 about?

23 MS. TRUNKES: I think just time deadlines for motions.

24 So there is a partial summary judgment motion that  
25 defendants plan to make, and then also your Honor had given the



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1 plaintiff leave to make the motion regarding the e-mails. If  
2 we can just go over the dates?

3 THE COURT: All right. Why don't we start with the  
4 summary judgment. So I have a dim recollection, Mr. Hurd, you  
5 want to move for partial summary judgment, but I must tell you  
6 I don't remember, I don't remember the basis or the claim that  
7 you wish to move on. Could you refresh my memory?

8 MR. HURD: There are several bases, but the main  
9 thrust of it is how damages, if plaintiff was entitled to  
10 damages, how they would be calculated, as we believe a decision  
11 on that issue would advance settlement discussions.

12 THE COURT: Well, I guess the question is now that  
13 we're at the end of discovery, why does it make sense for me to  
14 hear a partial summary judgment motion at this point? Why  
15 shouldn't it be a summary judgment motion on any matter that  
16 you think is deserving of summary judgment?

17 MR. HURD: Well, I don't have any objection to that,  
18 but when we were in court the last time, your Honor, you asked  
19 if I would be making another motion, summary judgment motion  
20 other than this one, and I represented to the court I wouldn't  
21 be, and my position hasn't changed.

22 THE COURT: Okay.

23 MR. HURD: It doesn't matter to me how we want to  
24 characterize it, that is how we intend to move on, in  
25 substance.

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1 THE COURT: That is fine. I am just going to set a  
2 date for summary judgment. It will be in whatever form you  
3 want to bring it. I understand it will be a motion for partial  
4 summary judgment; so, in other words, it will be a motion that  
5 is directed only to some issues in the case.

6 Now, does the plaintiff intend to move for summary  
7 judgment?

8 MS. TRUNKES: No.

9 THE COURT: All right. So we have this issue  
10 outstanding about the photographs and we have set a schedule  
11 for that. Then we have the issue about the non-production of  
12 the e-mail. So what I want to do at this point is set a  
13 schedule for the filing of summary judgment, and I am  
14 thinking --

15 MS. TRUNKES: Can I mention, your Honor, there had  
16 been a schedule already in place, but the due date for the  
17 defendant's motion I think was November 2nd, and that was  
18 during the hurricane, the storm. So I don't know if they need  
19 the full amount of time normally allotted since there has been  
20 time. I just wanted to opine that, your Honor.

21 MR. HURD: Well, I don't think any of your decisions  
22 here today, your Honor, impact our motion. We were going to  
23 suggest we could get our portion, our initial moving papers  
24 into the court by a week from Friday, which would be December  
25 7th.

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1 THE COURT: All right. 30 days for you to respond,  
2 Ms. Trunkes?

3 MS. TRUNKES: Yes, that would be fine, yes.

4 THE COURT: And a week to reply, Mr. Hurd?

5 MR. HURD: Can we get two weeks to reply, your Honor?  
6 I would expect the reply will be trickier than the moving  
7 papers.

8 THE COURT: All right. The 21st is actually a federal  
9 holiday. It is Martin Luther King Day, so it will be the 22nd.

10 MR. HURD: Thank you.

11 THE COURT: All right. Now, with respect to your  
12 anticipated motion, Ms. Trunkes, about the e-mail, what is your  
13 pleasure?

14 MS. TRUNKES: I guess I would ask, I would ask until  
15 the 14th, and only because I think we would need to get a  
16 declaration from a computer expert, and I can't say that I have  
17 that all lined up right now, but I would want to include that.

18 THE COURT: All right. How long will you need to  
19 respond to that, Mr. Hurd?

20 MR. HURD: Well, given the holidays and our summary  
21 judgment motion, I'd ask for a month.

22 THE COURT: All right. How long do you want to reply,  
23 Ms. Trunkes?

24 MS. TRUNKES: Two weeks.

25 THE COURT: All right. All right. So we will issue

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1 an order with all these dates. When I say "all these dates," I  
2 mean the dates for the summary judgment motion, the dates for  
3 the sanctions motion on the e-mail. I will attempt to resolve  
4 the outstanding issue about sealing.

5 Anything else?

6 MR. HURD: Not from me, your Honor.

7 MS. TRUNKES: I think that is it, your Honor.

8 THE COURT: I wish you both a very good night.

9 (Court adjourned)

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